Supreme Court of the United States

OCTOBER TERM, 1947

No. 390

SEABOARD AIR LINE RAILROAD COMPANY,
Appellant,

vs.

JOHN M. DANIEL, as Attorney General of the State of South Carolina, and W. P. BLACKWELL, as Secretary of State of South Carolina,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF FOR APPELLANT

W. R. C. COCKE,
J. B. S. LYLES,
Counsel for Appellant.

HAROLD J. GALLAGHER,
LEONARD D. ADKINS,
JAMES B. McDONOUGH, JR.,
Of Counsel.

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I

Opinion Below

The opinion of the court below (R. 155) is reported in 43 Southeastern (2nd) p. 839. It has not yet appeared in the South Carolina Reports.

II

Grounds of Jurisdiction

This appeal is taken pursuant to Section 237 of the Federal Judicial Code as amended (Title 28 U. S. C. A.

Sec. 344) from a final judgment of the Supreme Court of South Carolina, the highest court of that state, where there was drawn in question the validity of Section 8 of Article 9 of the Constitution of South Carolina and of Sections 7777-7779 inclusive and Sections 7784, 7789 of the Code of Laws of South Carolina (1942) on the ground of their being repugnant: (1) To a law of the United States, viz., Section 5 of the Interstate Commerce Act as amended; and (2) To the commerce clause of the Federal Constitution and to the due process and equal protection clauses of the Fourteenth Amendment thereto. The judgment appealed from was in favor of the validity of the State law.

III

Statement of the Case

Appellant, Seaboard Air Line Railroad Company (hereinafter sometimes referred to as the New Company), is a corporation organized and existing under the laws of the State of Virginia, and is a common carrier by railroad subject to the provisions of the Acts of Congress relating to interstate commerce. It is the successor in ownership and operation of the properties of Seaboard Air Line Railway Company (hereinafter referred to as the Old Company), an interstate railroad system comprising approximately 4200 miles of railroad lines in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama. Included in the properties acquired and now owned and operated by the New Company are 736 miles of railway main lines located in thirty counties in the State of South Carolina lying between and connecting with various points on the system in North Carolina and Georgia. In addition

the New Company acquired and owns over 600 separate tracts of miscellaneous real estate in South Carolina which are appurtenant to or are used or usable in connection with the operation of said system of railways. (R. 4, 140)

Section 8, Article 9 of the Constitution of South Carolina, and Sections 7777, 7778 and 7779 of the Code of South Carolina, 1942, all shown in the appendix to this brief, prohibit the ownership or operation of any railroad in South Carolina except by a railroad corporation created under the laws of that state. The Interstate Commerce Commission (hereinafter referred to as the Commission) found in appropriate proceedings and upon the evidence adduced that it would not accord with the national transportation policy and would not be consistent with the public interest and would impose an unnecessary and undue burden on interstate commerce to require the creation of a separate South Carolina corporation to acquire or to acquire and operate the properties of the Appellant located in that state (R. 108-113). The Commission also found affirmatively that the purchase by the Appellant of the railroad properties and other assets of the Old Company, and the operation thereof by Appellant in the State of South Carolina, were transactions within the scope of Section 5(2) of the Interstate Commerce Act as amended, and would be consistent with the public interest (R. 116).

The Supreme Court of South Carolina made its own finding (contrary to that made by the Commission) that the South Carolina requirements did not constitute a burden on interstate commerce and held, in substance, that even if they did, the Commission lacked the power under Section 5 of the Interstate Commerce Act to authorize the Appellant to operate its railroad lines in the State of South

Carolina without first obtaining a charter in accordance with the laws of that State (R. 162).

The properties of the Old Company were burdened with 18 separate mortgages securing outstanding bonds, and it had numerous wholly owned and partly owned subsidiaries, and leased lines (R. 67), resulting in an extraordinarily complex corporate and financial structure. The Reorganization Plan of the Old Company (hereinafter called the Plan) provided, among other things, that the proceedings for the foreclosure of the various mortgages should be expeditiously matured, that a Reorganization Committee should be appointed to carry out the Plan and to receive deposits of the securities of the Old Company, and that the Reorganization Committee should bid for the properties at the sale or sales under foreclosure and, if the successful bidder, should convey the properties to a new company to be organized for the purpose (R. 67) and it contemplated "a single new system subject to new consolidated system mortgages and the elimination of all prior liens" (R. 67). The general offices of the railroad and a substantial part of its properties were located in Virginia and it appeared logical and proper to the Reorganization Committee to select Virginia as the state of incorporation to avoid the expense and complexities inevitably connected with a multiple corporation; and the subsequent incorporation of the New Company on January 26, 1944, as a Virginia corporation was duly approved by the Courts.*

In order to consummate the Plan it was necessary to have authority from the Interstate Commerce Commission

*If the Reorganization Committee had selected South Carolina as the state of incorporation similaf problems would have been presented, under the provisions of Section 163 of the Virginia Constitution (Virginia Code 1942, Vol. 2, p. 2865).

under both Section 20a and Section 5 of the Interstate Commerce Act, and appropriate applications were filed by the New Company. The application under Section 20a was assigned Finance Docket No. 14500, and the application under Section 5 was assigned Finance Docket No. 14501. The report and order of the Commission dated June 28, 1946, which contains the findings and authorization involved in this appeal, embraced the proceedings in both Finance Dockets 14500 and 14501 (R. 59-134). The report discusses the limitations and prohibitions of the South Carolina laws (R. 108-113) and sets out the text of the constitutional provision in a footnote (R. 109).

In Finance Docket No. 14501 (under Section 5) applicant, on January 31, 1946 (R. 21) filed its Supplemental Application and Amendment No. 2 (R. 22-56), in which it specifically set forth that it did not propose to become a corporation of South Carolina, as well as of Virginia, and alleged that compliance with the requirements of South Carolina would constitute a substantial burden upon interstate commerce (R. 41), and in which it specifically prayed that the Commission authorize the acquisition of the properties by the New Company "as requested in the application, as amended and supplemented, including, specifically, the acquisition and operation of properties in South Carolina without becoming a domestic corporation of said state" (R. 42). No clearer or more specific notice of the authority requested in this connection could have been given, and as required by Section 5(2)(b) of the Interstate Commerce Act, the Commission duly notified the Governor of South Carolina of the pendency of that application (R. 5, 141). At the hearings thereon Appellant introduced substantial evidence in support of its contention respecting the burdens

which would be imposed, and no representative of the State of South Carolina appeared and there was no opposition on that ground to the making of the order requested of the Commission. The report and order of the Commission is no longer subject to review.

Subsequently to the Report and Order of the Commission, Appellant on August 1, 1946 acquired the properties of the Old Company, and proceeded to operate them, and issued its securities as provided for in the Plan (R. 4). On August 6, 1946, appellant applied to the appellee, W. P. Blackwell, Secretary of the State of South Carolina with a tender of the proper fees, for admission to do business in South Carolina as a foreign corporation pursuant to Sections 7764-7767 of the Code of South Carolina, 1942, which admit foreign corporations generally and contain no exception, in terms, with respect to railroad corporations. This tender, which appears in the record (R. 134) was accompanied by a certified copy of the report and order of the Commission. The Secretary of State refused to accept and file the papers because of and in reliance on Section 8 of Article 9 of the Constitution and Sections 7777-7779 of the Code of South Carolina (R. 142).

Although it is not necessary for this Court to consider the question, the Appellant alleged and still contends that if its tender of compliance with the general law respecting foreign corporations had been accepted it would have become subject to the local laws of the State of South Carolina in all respects, including the police and taxing powers of the state, in the same manner as any other foreign corporation admitted to do business therein, and that it would have no special privileges or prerogatives (R. 16). The answer of the Respondent contained a denial of that contention

(R. 144). This Court, however, is not concerned with that issue. Appellant submits that this Court should reverse the decision and judgment of the Supreme Court of South Carolina in so far as that Court held that the order of the Commission was in excess of the power conferred by Section 5, and should direct the Supreme Court of South Carolina to take further proceedings in accordance with the opinion of this Court. Appellant does not seek to have this Court pass upon that part of its complaint in the Court below which sought an order of mandamus directed to the Secretary of State. The precise manner in which the Appellant will be permitted to comply with the applicable laws of the State of South Carolina is a matter of local concern. The Commission itself pointed out in its findings that (R. 113):

> "The provisions of section 5(11) will relieve the new company of the restraints, limitations and prohibitions of State law only insofar as may be necessary to enable it to carry into effect the transactions approved and provided for, in accordance with the terms and conditions which we impose, and to hold, maintain, and operate any properties, and exercise any control or franchises acquired through such transactions".

That tender of compliance with the laws of the State of South Carolina applicable generally to foreign corporations, is still in effect.

The prohibition against ownership, unless the exercise of the Commission's power has made that prohibition ineffectual, would invalidate the title of the New Company to its properties in South Carolina, which were a substantial part of the consideration for the issuance of its securities,

and which are a substantial part of the properties subject to the liens of its mortgages and the securities underlying its bonds. In addition Sections 7784 and 7789 of the Code of South Carolina, 1942, provide penalties for operation by a foreign railroad corporation in the state without complying with its constitutional and statutory provisions requiring incorporation in South Carolina. The penalty prescribed is the forfeiture of $500 for each county in which the prohibited operation occurs, to be recovered in the court of common pleas of such county. Appellant operates in thirty counties in that state.

The statutes of South Carolina provided no method by which Appellant could test in advance the validity as to it of the prohibitions and penalties of the South Carolina constitution and statutes, so that compliance with the order of the Commission, after the refusal of the tender of compliance with the general law respecting foreign corporations, would have subjected Appellant to the danger of repeated suits in thirty different counties for the recovery of such penalties. Accordingly, upon the refusal of the Appellee, Secretary of State, to permit Appellant to qualify as any other foreign corporation for business in South Carolina, appellant brought this suit in the original jurisdiction of the Supreme Court of South Carolina. Upon the filing of the suit, the Chief Justice of the Court issued a restraining order against the appellee Attorney General, prohibiting him *pendente lite* from enforcing the penalty provisions of the South Carolina statute (R. 1).

The complaint (Rec. pp. 2-18) set up the foregoing facts, alleged the right of Appellant to acquire, own and operate the railroad properties in South Carolina under authority of the provisions of Section 5 of the Interstate

Commerce Act and of the order of the Commission, and asserted the invalidity of the prohibitions of Section 8 of Article 9 of the Constitution, and of Sections 7777-7779 and Section 7784 of the Code of South Carolina, as in conflict with the rights of Appellant under the Commerce Clause and under the Fourteenth Amendment.

As the South Carolina practice permitted the Appellant to seek in the same complaint both injunctive relief against enforcement of the penalties by the state attorney general on the ground of the invalidity of the state prohibition against ownership and operation of a railroad by a foreign corporation, and also mandamus directed to the Secretary of State requiring him to permit Appellant to qualify for business in South Carolina, as permitted to foreign corporations generally, the prayer of the complaint sought relief in both these aspects (Prayer, R. p. 18).

The answer and return of the Appellees to the rule to show cause issued by the court to show why the Attorney General should not be enjoined from enforcing the South Carolina statutory and constitutional provisions (Rec. pp. 137-145) admitted all the facts necessary to a determination with respect to the validity of the order of the Commission, but challenged the power of the Commission to authorize Appellant to acquire, own and operate the properties of the Old Company in South Carolina without becoming a corporation of that state.

Appellant demurred to the answer (R. pp. 147-151), no evidence was introduced, and the case was heard solely upon the pleadings and upon the questions of law presented thereby.

Following original argument in November 1946, and reargument in March 1947, the Supreme Court of South

Carolina handed down its opinion and order, squarely upholding the validity of the South Carolina requirements, making its own finding that those requirements did not constitute a burden on interstate commerce, and holding that regardless of whether or not they did constitute a burden on interstate commerce, the Commission was without power under Section 5 of the Interstate Commerce Act to authorize Appellant to operate its railroad lines in South Carolina without first obtaining a charter, and that Court thereupon directed the dismissal of the Complaint (Opinion R. pp. 155-162), but, in its Order allowing this appeal, it continued in effect the temporary restraining order against the enforcement of the penalty provisions of the South Carolina statutes (R. 167-8).

IV

Specification of Assigned Errors to be Urged

The assigned errors intended to be urged are Nos. 1 to 7, and 9 to 11, inclusive (R. pp. 163-167).

V

Summary

1. Section 5 of the Interstate Commerce Act as amended by the Transportation Act of 1940 (49 U. S. C. A. Sec. 5; 54 Stat. 905) conferred plenary power upon the Interstate Commerce Commission to determine, as it did, that it was in the public interest for Appellant, a Virginia railroad corporation, and a common carrier subject to the Act of Congress regulating interstate commerce, to acquire, own and operate the interstate railway system of the Old Company in accordance with the Reorganization Plan.

Section 5(11) gave Appellant the power, upon approval by the Interstate Commerce Commission, to acquire, own and operate the Seaboard System, including the railroad lines and other properties in South Carolina, without compliance with the constitutional and statutory provisions of that state requiring incorporation therein. (Assignment of Errors Nos. 1, 2, 3, 4—R. pp. 163-164—Statement of Points Nos. 1, 2, 3—R. pp. 171-172.)

The constitutional and statutory provisions of South Carolina prohibiting a foreign railroad corporation from acquiring or operating a railroad in South Carolina are in direct and irreconcilable conflict with the power conferred upon Appellant by Section 5(11) of the Interstate Commerce Act, upon approval of the Interstate Commerce Commission, to acquire, own and operate the railroad lines and other properties in South Carolina. (Assignment of Errors Nos. 2, 3, and 4—R. pp. 163-164—Statement of Points Nos. 2 and 4—R. pp. 171-172.)

Section 5 of the Interstate Commerce Act (49 U. S. C. A. 5), paragraphs (2) (a) (1) (2) (c), (2) (d), (4) (a), (b), (11).

Texas v. *United States,* 292 U. S. 522, 78 L. Ed. 1402.

In Re Mo. Pac. R. Co., 39 F. Supp. 436.

In Re: New York N. H. & H. R. Co., 147 F. (2d) 40, cert. den. 325 U. S. 884, 89 L. Ed. 199.

Colorado v. *United States,* 271 U. S. 153, 70 L. Ed. 878.

Alabama & V. R. Co. v. *Jackson & E. R. Co.,* 271 U. S. 244, 70 L. Ed. 928.

Minneapolis, St. P. & S. S. R. Co. v. *Railroad Commission*, 183 Wis. 47, 197 N. W. 352.

Chicago & E. I. Ry. v. *Miller*, 309 Ill. 257, 140 N. E. 823.

Whitman v. *Northern Cent. Ry. Co.*, 146 Md. 580, 127 Atl. 112.

In Re St. Louis Southwestern Ry. Co., 53 Fed. Supp. 914.

2. (a) The Commission made the affirmative finding (R. 116), in its Report issued June 28, 1946, approving the acquisition and operation by the Appellant of the railway system of the Old Company, that such acquisition and operation would be consistent with the public interest. It also found that compliance with the constitutional and statutory requirements of South Carolina that Appellant became a corporation of that state, would impose an undue burden upon interstate commerce and would be contrary to the transportation policy of Congress as announced in the Transportation Act of 1940 and would not be consistent with the public interest (R. 111-113). The latter findings, however, were not prerequisite to the exemption of Appellant from compliance with the South Carolina law, since Section 5(11) of the Act, by its terms, gives Appellant all powers needed for such acquisition, ownership and operation upon the finding by the Commission that such acquisition, ownership and operation is consistent with and in the public interest. (Assignment of Errors Nos. 4, 5, and 6—R. pp. 164-165; Statement of Points No. 3.)

See citations under 1 above and

United States v. *New River Co.*, 265 U. S. 533, 68 L. Ed. 1165.

Ohio v. *United States*, 292 U. S. 498, 78 L. Ed. 1388.

(b) If findings by the Commission with respect to the burdens imposed on interstate commerce are prerequisite to the exemption of Appellant from compliance with the South Carolina law, the necessary findings have been made, upon relevant evidence which afforded a basis for the informed judgment of the Commission, and neither a contrary finding by the State court nor the reserved powers of a state will validate state laws found by the Commission to burden interstate commerce or to be inconsistent with the national transportation policy.

Southern Pacific Co. v. *Arizona*, 325 U. S. 761, 89 L. Ed. 1915.

Morgan v. *Virginia*, 328 U. S. 373, 90 L. Ed. 1317.

Securities and Exchange Commission v. *Chenery Corporation*, 332 U. S. 194, 91 L. Ed. Adv. 1429.

Freeman v. *Hewitt*, 329 U. S. 249, 91 L. Ed. Adv. 205.

Bethlehem Steel Co. v. *New York Labor Relations Board*, U. S. , 91 L. Ed. 887.

3. Appellant is not only an instrumentality of interstate commerce within the dominant protection of Congress, but it is also an instrumentality of the Federal Government to carry its mails, properties and troops, and is therefore within the rule that a state may not constitutionally use its powers to exclude a foreign corporation from the trans-

action of business within its borders, if in so doing it denies a Federal right or prevents the performance of functions imposed by Federal authority. (Assignment of Errors 1, 5, 6, 7, 9 and 10—R. pp. 163-166; Statement of Points Nos. 2, 4, 5—R. pp. 171-172.)

Looney v. *Crane Co.*, 245 U. S. 178, 62 L. Ed. 230.

Horn Silver Mining Co. v. *New York*, 143 U. S. 305, 36 L. Ed. 164.

Pensacola Tel. Co. v. *Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708.

West v. *Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716.

United States v. *Ju Toy*, 198 U. S. 253, 49 L. Ed. 1040.

Carter v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160.

Harrison v. *St. L. & S. F. R. Co.*, 232 U. S. 318, 58 L. Ed. 621.

Bowman v *Continental Oil Co.*, 256 U. S. 642, 65 L. Ed. 1139.

Crutcher v. *Kentucky*, 141 U. S. 47, 35 L. Ed. 649.

Southern Ry. v. *Tompkins*, 48 S. C. 49, 25 S. E. 982.

C. C. & O. Ry. v. *McCown*, 84 S. C. 318, 66 S. E. 418.

Donald v. *Philadelphia & Reading R. Co.*, 241 U. S. 329, 60 L. Ed. 1027.

Buck v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623.

Foster-Fountain Packing Co. v. *Haydel*, 278 U. S. 1, 73 L. Ed. 147.

Frost v. *R. R. Commission*, 271 U. S. 583, 70 L. Ed. 1101.

International Paper Co. v. *Mass.*, 246 U. S. 135, 62 L. Ed. 624.

Sprague v. *Thompson*, 118 U. S. 90, 30 L. Ed. 115.

International Textbook Co. v. *Pigg*, 217 U. S. 91, 54 L. Ed. 678.

Lynch v. *U. S.*, 292 U. S. 571, 78 L. Ed. 1434.

Williams v. *Standard Oil Co.*, 278 U. S. 235, 73 L. Ed. 287.

Stockton, Atty. Gen., v. *Baltimore & New York R. Co.*, 32 Fed 9.

4. The South Carolina constitutional and statutory provisions are void in and of themselves as imposing an undue obstruction to and burden upon interstate commerce. They prohibit ownership and operation of any railroad even in interstate commerce, and do not attempt to confine the prohibition to ownership and operation in intrastate commerce, even if such a limited prohibition could, as to an interstate railway system whose operations in intrastate and interstate commerce are necessarily inextricably blended and intertwined, be valid. Not only for this reason, but because the South Carolina law prohibits not only operation but also ownership, the State law is incapable of being

construed as a prohibition confined alone to intrastate operation.

See citations under 3 above, and

Essex v. *New England Tel. Co.*, 239 U. S. 313, 60 L. Ed. 301.

Central Pacific R. Co. v. *California*, 162 U. S. 91, 40 L. Ed. 903.

5. The refusal of the State of South Carolina to admit Appellant to do business therein, denies to Appellant the equal protection of the laws, and deprives it of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, because other foreign corporations are freely admitted by South Carolina, and because Appellant is entitled to admission by virtue of the order of the Commission. There is no reasonable basis for such classification and discrimination. (Assignment of Errors No. 8—R. p. 166; Statement of Points No. 6—R. p. 172.)

Liggett Co. v. *Lee*, 288 U. S. 517, 77 L. Ed. 929.

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927.

Power Mfg. Co. v. *Saunders*, 274 U. S. 490, 71 L. Ed. 1165.

VI

Argument

(1)

Section 5 of the Interstate Commerce Act Conferred Plenary Power upon the Interstate Commerce Commission to Authorize Appellant to Acquire, Own, and Operate the Properties of the Seaboard System in South Carolina Without Becoming a Corporation of that State.

The Supreme Court of South Carolina does not question the power of Congress to give the Commission exclusive power to authorize Appellant to acquire, own and operate the properties, or the power of Congress to give Appellant the power to acquire, own, and operate without compliance with the South Carolina law. The Court simply held that by Section 5 of the Interstate Commerce Act Congress had failed to give such power. In its opinion (R. p. 159) the court said:

> "The supremacy of congressional legislation over the entire subject of interstate commerce and its instrumentalities has been upheld in numerous cases."

The Supreme Court of South Carolina ordered a reargument for the sole purpose of hearing counsel on the question whether it had jurisdiction of the subject of the action (R. 153-155). The memorandum opinion ordering reargument and the final opinion (R. 155) both show a misapprehension with respect to the powers actually exercised by the Commission, and impute to the Commission an exercise of a power broader than was actually exercised in this case, and distort not only the language of Section 5

of the Interstate Commerce Act but also the report of the Commission.

In the opinion ordering reargument the Court below said that one of the questions argued before it was whether the Commission had not gone beyond its jurisdiction and into a field in which it was not directed by the Act of Congress "in undertaking to say in what state a railroad corporation should be chartered, and in what state it should not be chartered" (R. 154). In the subsequent opinion, the Court below repeated the same language (R. 157). It then said that (R. 159):

> "The defendants raise no question as to the constitutional power of the Congress to confer authority upon the Commission to approve the purchase and reorganization of the old Seaboard Air Line Railway Company. The question here has to do simply with the scope of the authority which has been conferred."

The Court below then quoted at length the pertinent provisions of Section 5(11) of the Interstate Commerce Act, and reached the crux of its decision in the following sentences (R. 160, 162):

> "We think it clear from the whole quoted section that the prohibition against the creation, directly or indirectly, of a federal corporation likewise excluded any power to control, limit or prohibit incorporation under state laws. And it follows that no power was conferred upon the Commission to say in what state or states a railroad company may be incorporated or not incorporated."
>
> * * *
>
> "Holding as we do that the Interstate Commerce Commission lacked the power under Section 5 of the Interstate Commerce Act to authorize the plain-

> tiff to operate its railroad lines in this state without first obtaining a charter, it necessarily follows that the complaint should be dismissed and the restraining order heretofore granted revoked.
>
> "It is so ordered."

The first of the above quoted sentences is, of course, a clear *non sequitur*. The prohibition against the creation of a Federal corporation has nothing whatsoever to do with the removal of restraints of state laws so far as may be necessary to carry into effect the transactions here approved by the Commission. The second sentence repeats the overstatement of the power exercised by the Commission, which, if it had been exercised, might be questionable, but which need not be considered here. The Court again repeats the same overstatement when it says that (R. 161), "it may be inferred, as we have pointed out, from the language used that the purpose was to prohibit the Commission from directly or indirectly determining what state or states a railroad company should be incorporated in", and that (R. 162), "it is far from clear that the Act conferred upon it [the Commission] the power to discriminate, in effect, against any state or states by adjudging in what state a charter should be granted."

The Commission had nothing to do with "adjudging" in what state the New Company should be incorporated. The Commission did not "say" in what state the New Company should be incorporated, nor did it discriminate against the State of South Carolina. The selection of the State of Virginia was made by the Reorganization Committee and approved by the Courts having charge of the receivership proceedings and was not made by the Commission. The Commission simply authorized Appellant to

carry out its functions and duties as a carrier without either multiple incorporation or operation through a subsidiary.

The sweeping and comprehensive language of Section 5, and in particular Paragraph (11), expressly and specifically gives the Commission power to authorize Appellant to acquire, own and operate the entire Seaboard System, including the railroads and other properties in South Carolina, and gives Appellant power to exercise such authority without becoming a corporation of South Carolina.

The manifest purpose of Section 5 was to assure that the Commission should have comprehensive and exclusive powers over the entire subject of the acquisition and control and right of operation of interstate commerce carriers. Thus 5(2)(a)(i) expressly makes it:

> "lawful with the approval and authorization of the Commission * * * for any carrier * * * to purchase, lease, or contract to operate the properties * * * of another."

Paragraph 5(2)(b) provides that when a transaction is proposed for the acquisition of railroad properties, the Commission shall notify the Governor of each state in which any part of the railroad properties is located, hold a public hearing, and afford interested parties a reasonable opportunity to be heard. If the Commission finds that the acquisition

> "will be consistent with the public interest, it shall enter an order approving and authorizing such transaction."

Any question as to the exclusive and plenary nature of the power given to the Commission by Congress is removed by Paragraph 11, which provides that the power conferred shall be "exclusive and plenary;" that any carrier participating in any transaction approved by the Commission:

> "shall have full power * * * to carry such transaction into effect and to own and operate any property and exercise any control or franchises acquired through said transaction without invoking any approval under State authority;"

and that any carrier under such circumstances is:

> "hereby relieved from * * * all other restraints, limitations and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * * and to hold, maintain and operate any properties, and exercise any control or franchises acquired through such transaction."

In its Report and Order of June 28, 1946 (R. 116) the Commission specifically found that:

> "* * * the purchase by the Seaboard Air Line Railroad Company of the railroad properties and other assets of the Seaboard Air Line Railway Company or its receivers, or both, and operation thereof in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama, * * * are transactions within the scope of section 5(2) of the Interstate Commerce Act, as amended, that the terms and conditions proposed are just and reasonable, and that the transactions will be consistent with the public interest."

That finding of the Commission specifically includes operation by Seaboard Air Line Railroad Company of the properties in South Carolina. The Commission's finding is conclusive for all purposes and cannot now be questioned by the State of South Carolina or by anyone else. In the case of *United States* v. *New River Co.*, 265 U. S. 533, 68 L. Ed. 1165 this Court said:

> "The courts will not review determinations of the Commission made within the scope of its powers, or substitute their judgment for its findings and conclusions."

The Commission's Order (R. 129) contains the following paragraph:

> *"It is ordered*, That, subject to the conditions with respect to the protection of employees stated in said report, the purchase by the Seaboard Air Line Railroad Company of the railroad properties and other assets of the Seaboard Air Line Railway Company or its receivers, or both, and the operation by the former of such railroads, including those operated under contract, lease, or agreement, and the acquisition of control or joint control by the Seaboard Air Line Railroad Company through ownership of capital stock of certain other railroad companies and the Baltimore Steam Packet Company, described in the report aforesaid, upon the terms and conditions in said report found just and reasonable, be, and it is hereby, approved and authorized."

Paragraph (11) of Section 5 by its terms authorized Seaboard to exercise the authority so granted and relieves Seaboard from the operation of "all other restraints, limitations and prohibitions of law, Federal, State or municipal" in so far as necessary to enable it to carry out the Commission's Order.

This case is clearly ruled by *Texas* v. *United States*, 292 U. S. 522, 78 L. Ed. 1402, in which the court upheld the power of the Interstate Commerce Commission to authorize the Kansas City Southern Railway Company, a Missouri corporation, to acquire control by lease of the railroad and

properties of the Texarkana & Ft. Smith Railway Company, a Texas corporation. The State of Texas attacked the order of the Commission because the lease approved by the Commission permitted the lessee to abandon or remove from Texas the general offices, shop, etc., of the lessor as in violation of the Texas law which confined to Texas corporations the right to "own or maintain any railways" within the state, and required the company to maintain the offices of its principal officers and the location of its general offices, machine shops or roundhouses in the State unless otherwise approved by the State Railroad Commission. Upholding the power of the Commission under Section 5 of the Interstate Commerce Act to disregard the provisions of the Texas law, the court said:

> "These broadening provisions of the Emergency Railroad Transportation Act 1933 confirm and carry forward the purpose which led to the enactment of Transportation Act 1920 (Title 4, 41 Stat. 474 et seq.) (49 U. S. C. A., § 1 et seq.) We found that Transportation Act 1920 introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. To attain that end, new rights, new obligations, new machinery, were created. * * * The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. * * * The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as

shown by the context and purpose of the act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities.' * * *

"In the present case, the findings of the Commission, setting forth undisputed facts, leave no doubt that the provision of the lease permitting the abandonment, or removal from the state, of general offices and shops of the lessor has direct relation to economy and efficiency in interstate operations and to the achievement of the purpose which the Congress had in view in its grant of authority.

"* * * The scope of the immunity must be measured by the purpose which Congress had in view and had constitutional power to accomplish. As that purpose involved the promotion of economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure, the removal of such burdens when imposed by state requirements was an essential part of the plan. The State urges that in the course of the passage of Transportation Act, 1920, a provision for federal incorporation of railroads was struck out. But while railroad corporations were left under state charters, they were still instumentalities of interstate commerce, and, as such, were subjected to the paramount federal obligation to render the efficient and economical service required in the maintenance of an adequate system of interstate transportation. *Colorado* v. *United States,* 271 U. S. 153, 70 L. Ed. 878, 46 S. Ct. 452, *supra.*"

The Supreme Court of South Carolina attempted to weaken the force of the *Texas* case by saying that the precise question was not there involved, but that is an incorrect analysis of the case. The State of Texas con-

tended that its laws prohibited ownership or operation of railways by a foreign corporation and this Court held that the Kansas City Southern (a Missouri corporation) could nevertheless operate in Texas, on the basis of Commission authority so to do under Section 5.

The *Texas* case was decided before the enactment of the Transportation Act of 1940, which substantially revised Section 5 of the Interstate Commerce Act. It is clear that the revision made by the Transportation Act of 1940 was intended primarily to make doubly certain that the Commission's power over all phases of acquisition of control of railroads and of acquisition and operation of railroad property should be absolute and exclusive, and that no restrictions of state law should be permitted to interfere with the public policy in those matters as determined by the Commission. That intention is particularly obvious from paragraph (11) of Section 5, which reads as follows:

> "The authority conferred by this section shall be *exclusive* and *plenary*, and *any carrier* or *corporation* participating in, or resulting from, any transaction approved by the Commission thereunder, shall have full power * * * * * to carry such transaction into effect, and to *own*, and *operate* any properties, and exercise any control or franchises, acquired through said transaction, *without invoking any approval under State authority;* and any carriers or other corporations * * * * * participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws, and of *all other restraints, limitations,* and *prohibitions* of law, Federal, State, or municipal, in so far as may be necessary to enable them to carry into effect the transaction so approved or provided for * * * * and to *hold,*

> *maintain,* and *operate* any properties, and exercise any control or franchises acquired through such transaction." (Emphasis supplied)

To make assurance doubly sure of the intention of Congress to exert complete and unqualified supremacy over acquisitions, the paragraph concludes that, while nothing contained therein shall be construed to create or provide for the creation of a Federal corporation, yet:

> "* * * any power granted by this section to any carrier or other corporation shall be deemed to be *in addition to and in modification of its powers under its corporate charter or under the laws of any State.*" (Emphasis supplied)

The corresponding provision in effect before 1940 was paragraph 15, which read as follows:

> "The carriers and any corporation affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws * * * and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by such order".

That was the provision construed by the Supreme Court in the *Texas* case and even under that provision the Court had no doubt that the authority granted by the Interstate Commerce Commission was sufficient to override state restrictions including State requirements for local incorporations. Of course, the amended provision is much more specific on that point.

The Supreme Court of South Carolina apparently relied primarily on the provision of paragraph (11) negativing the creation of a Federal corporation. That provision, however, has no bearing whatsoever on the question now before the Court. Congress might have chosen to accomplish its purpose by authorizing Federal incorporation of railroad corporations but the same purpose could be more easily accomplished by exercising the undoubted power of the Federal Government to give additional powers to corporations engaged in interstate commerce and organized under state laws. (See cases cited on page 36 to 40, below.)

The *Texas* case was cited as authority in *In Re Missouri Pacific R. Co.*, 39 F. Supp., 436 (June 20, 1941), in which the Court sustained the powers of the Court and the Commission under Section 77(f) of the Bankruptcy Act to direct the acquisition and operation of the so-called Gulf Coast Lines in Texas by a Missouri corporation, despite the prohibitions of the Texas laws which provide that no corporation except one chartered under the laws of Texas should be authorized to operate a railroad in that state. The Court there said at page 448:

> "Inconsistent State laws must give way to consolidations effected under authority of the commerce or bankruptcy powers of the federal constitution."

showing that the power existed under Section 5(11) of the Interstate Commerce Act, as well as under the powers conferred by Section 77(f) of the Bankruptcy Act. Likewise in the case of *In Re New York N. H. & H. R. Co.*, 147 F. (2d) 40, at page 52, certiorari denied 325 U. S. 884, 89 L.

Ed. 199, it was held that even if the Boston Terminal Act, a statute of the State of Massachusetts, was considered as an exercise of the police power of that state, its burdensome regulations should be superseded by the provisions of a duly approved plan of reorganization under the authority conferred by Section 77(f) of the Bankruptcy Act, and the powers conferred by the latter act are no broader than Section 5(11) of the Interstate Commerce Act.

The authority exercised by the Commission under Section 5 of the Act is analogous to the authority exercised by the Commission under paragraphs 18-20 of Section 1 of the Act. In *Colorado* v. *United States*, 271 U. S. 153, 70 L. Ed. 878, Colorado brought a suit to enjoin and set aside an order of the Commission permitting the abandonment by the Colorado & Southern of a branch line located wholly in that State. The railroad company owned and operated in intrastate and interstate commerce a railroad system located partly in Colorado and partly in other states. The branch which it sought to abandon was constructed under the authority of Colorado and was acquired by it under authority of that State. The line was narrow gauge and was physically detached from other lines of the company, but it was operated in both interstate and intrastate commerce as a part of the system of the Colorado Southern by means of connections with other railroads. This Court sustained the power of the Commission to grant the certificate of abandonment.

Alabama & V. R. Co. v. *Jackson & E. R. Co.*, 271 U. S. 244, 70 L. Ed. 928, arose under Section 1 of the Interstate Commerce Act. In that case the two railroads were both Mississippi corporations and each owned and operated in both intrastate and interstate commerce a rail-

road within that state. The Jackson Railway instituted a proceeding under Mississippi law to secure by eminent domain a connection with the Alabama Railway's line at a point east of the City of Jackson. Prior to instituting the eminent domain proceeding the Jackson Railway had secured from the Interstate Commerce Commission a certificate authorizing an extension of its line. That order, however, made no reference to the crossing which the Jackson Railway sought in the eminent domain proceedings in the State court. This suit was brought by the Alabama Railway in a State court in Mississippi to enjoin the Jackson Railway from pursuing the eminent domain proceeding on the ground that the Interstate Commerce Commission had exclusive jurisdiction over the establishment of junctions or physical connections between railroads engaged in interstate commerce. The Supreme Court of Mississippi dismissed the suit brought to enjoin the eminent domain proceedings. The Court on writ of error reversed that court, saying:

> "It is true that in this case the state court found that the place selected for the junction was a proper one. But the power to make the determination whether state action will obstruct interstate commerce inheres in the United States as an incident of its power to regulate such commerce. Compare *Colorado v. United States* (No. 195, decided May 3, 1926), 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878. In matters relating to the construction, equipment, adaptation and use of interstate railroad lines, with the exceptions specifically set forth in paragraph 22, Congress has vested in the Commission the authority to find the facts and thereon to exercise the necessary judgment."

State courts have consistently recognized that under Section 20(a)(7) of the Act carriers could issue securities authorized by the Commission without regard to state restrictions, in spite of the fact that Section 20(a) does not expressly confer additional corporate powers, as does Section 5. Thus in *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Railroad Commission*, 183 Wis. 47, 197 N. W. 352, the Railroad Commission of Wisconsin under the statute of that State collected fees from the railroad upon bonds which had been approved by the Interstate Commerce Commission under Section 20(a)(7). The railway paid the Wisconsin fees under protest and filed suit for their recovery on the ground that they were illegal under section 20(a)(7), and the state court permitted their recovery, saying:

> "It is argued by counsel for the state that the construction we have given to the federal statute would in effect modify the laws of the state creating the corporation, and that this is beyond the power of Congress. We have no doubt that under the federal Constitution giving Congress the broad power to regulate commerce between the states, in the exercise of that power it may enact statutes which operate to modify or supersede state legislation which seeks to control or regulate interstate commerce.
>
> "In a case where it was claimed that a corporation was created by a state and was therefore not subject to the regulations under consideration, the court said:
>
> > 'We cannot conceive how it is possible for anyone to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the states when exerting their power to create corporations. No

such view can be entertained for a moment.' *Northern Securities Co.* v. *United States*, 193 U. S. 197, 345, 24 Sup. Ct. 436, 460 (48 L. Ed. 679); *Houston E. & W. T. R. Co.* v. *United States*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341; *Minnesota Rate Case*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18."

Similar situations arose in *Chicago & E. I. Ry.* v. *Miller*, 309 Ill. 257, 140 N. E. 823 and in *Whitman* v. *Northern Cent. Ry. Co.*, 146 Md. 580, 127 Atl. 112, in which the Illinois and Maryland courts enforced the provisions of Section 20 (a) of the Interstate Commerce Act and permitted interstate railroads to recover state imposed fees for issuing securities.

In Re St. Louis Southwestern Ry. Co., 53 Fed. Supp. 914 involved a railroad reorganization. The court held that even though the provision of Missouri law prohibiting issuance by corporations of stock or bonds, except for money paid, labor done or property actually received, was applicable to the railway company domiciled in Missouri, such provision was superseded by the Interstate Commerce Act.

The argument in this Section (1) may be briefly summarized as follows:

(a) The decision of the Supreme Court of South Carolina is clearly inconsistent with the decision of this Court in *Texas* v. *United States*, 292 U. S. 522, 78 L. Ed. 1402 unless the amendments of Section 5 made by the Transportation Act of 1940 have weakened rather than strengthened the powers granted by Congress to the Interstate Commerce Commission and to the carriers under that section;

(b) Far from weakening those powers, the amendment of Section 5 has clarified and strengthened the exclusive and plenary power given to the Commission and has made specific the grant of additional corporate power to affected carriers; and

(c) The provision negativing Federal incorporation, on which the South Carolina Court primarily relies, cannot be construed as any limitation on the powers granted to the Commission and to the carriers. The South Carolina Court has disregarded the clear power of Congress to confer additional powers on state corporations, without Federal incorporation.

(2)

Under Section 5 (11) of the Interstate Commerce Act the Commission had Plenary Authority to Authorize Appellant to Operate in South Carolina upon the Affirmative Finding that Such Acquisition is in the Public Interest. It Was Not Necessary for the Commission to Find, Though It Did, that Compliance with the South Carolina Law Would Impose an Undue Burden Upon Interstate Commerce, and Would Not Accord with the National Transportation Policy Nor Be Consistent with the Public Interest.

Under Section 5 (a)(1) of the Act, pursuant to which Appellant obtained the right to acquire the lines of the old company, there is no qualification of the power of the Commission to authorize any carrier to purchase the properties of another, and under paragraph (11) any carrier participating in any transaction approved by the Commission "shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise

any control or franchises acquired through said transaction without invoking any approval under State authority."

All that the Commission need find is that the transaction is consistent with the public interest. The Commission was not required to find that the South Carolina law imposed a burden upon interstate commerce, because the statute itself, in paragraph (11), provides further that "any carriers * * * * participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation * * * * of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for * * * * * and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

Thus the foregoing provisions are clearly self-executing, and the *power* in the new company to acquire, own, and operate was not conferred by the Commission but by the statute, and came into play as soon as the Commission had determined that the acquisition of the properties of the old company by the Appellant was in the public interest.

However, to the extent that the finding by the Commission that compliance with the South Carolina law would impose an undue burden upon commerce and would conflict with the national transportation policy of Congress is pertinent, that finding was conclusive upon the South Carolina court. *United States* v. *New River Co.*, 265 U. S. 533, 68 L. Ed. 1165; *Ohio* v. *United States*, 292 U. S. 498, 78 L. Ed. 1388.

In this case, the state court, in one sentence, undertook itself to exercise the power conferred upon the Commis-

sion, with respect to the finding of fact. Having before it only the report and order of the Commission, and not the evidence upon which the finding in question was made (except to the extent set forth in the report and order itself) the Court below undertook to balance the conveniences and to determine independently and for itself the question the Commission was empowered to decide and had already decided. The Court below said that (R. 162), "As shown by the report and order of the Commission, the cost incident to obtaining a South Carolina charter is negligible as compared with the millions of dollars in value of the physical properties and the millions of dollars of income owned and controlled by the plaintiff". In other words, and as it specifically stated in the next sentence, the Court below made a finding of fact important to its decision (although stated as if its importance was not clearly felt) and contrary to the finding of the Commission on the same fact. The Court below said:

> "It might be inconvenient or undesirable to obtain a South Carolina charter, but we do not see how such requirement would constitute a burden on interstate commerce."

In other words, the Court below substituted its judgment for that of the Commission and found that the South Carolina requirements did not constitute a burden on interstate commerce.

There was here the appraisal and accommodation by the Commission of competing demands of the state and national interests involved. (*Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 89 L. Ed. 1915). In the case of *Morgan* v. *Virginia*, 328 U. S. 373, 90 L. Ed. 1317 as pointed out in the dissenting opinion of Mr. Justice Burton,

the mere recital of a nation-wide diversity among state statutes upon the subject in question was sufficient to support the holding that the Virginia statute involved in that case was invalid as an undue burden on interstate commerce. With respect to such administrative findings, as this Court said in *Securities and Exchange Commission* v. *Chenery* 332 U. S. 194, 91 L. Ed. Adv. 1429:

> "Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress".

See also:

Freeman v. *Hewitt*, 329 U. S. 249, 91 L. Ed. Adv. 205.

Bethlehem Steel Co. v. New York Labor Rel. Bd., 330 U. S. 767, 91 L. Ed. Adv. 887.

So. Pac. Co. v. *Arizona*, 325 U. S. 761, 89 L. Ed. 1915.

(3)

Appellant Is Not Only an Instrumentality of Interstate Commerce But Is Also an Instrumentality of the Federal Government Within the Rule that a State May Not Use Its Constitutional Powers to Exclude a Foreign Corporation from Business Within Its Borders If in So Doing It Denies a Federal Right or Prevents the Performance of Functions Imposed by Federal Authority.

It has already been pointed out that the wording of Section 5 of the Interstate Commerce Act, and in particular Paragraph (11), makes it clear that Congress intended to confer upon carriers acquiring properties of another

carrier with the approval of the Commission powers in addition to their powers under state laws to the extent necessary to carry out the national transportation policy. That Congress may give additional powers to a state corporation is settled by the decisions of this Court. It is also settled that a state may not use its powers to exclude a foreign corporation from business within its borders, if in so doing it denies a federal right or impedes the exercise of functions imposed upon the corporation by the Federal government or directly burdens interstate commerce. *Looney* v. *Crane Co.*, 245 U. S. 178, 62 L. Ed. 230; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 36 L. Ed. 164; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 24 L. Ed. 708; *Stockton, Attorney General* v. *Baltimore & New York R. Co.*, 32 Fed. 9 (C. C. N. J.); *Essex* v. *New England Tel. Co.*, 239 U. S. 313, 60 L. Ed 301.

Under Title 39, U. S. C. A., Section 541, 39 Stat. 429:

> "All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States, in the manner, under the conditions and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith."

Under this provision mail service is compulsory (*United States* v. *New York Central R. R. Co.*, 279 U. S. 73, 73 L. Ed. 619), and Appellant is a servant of the Federal Government in the matter of transportation of the mails, performance of whose service can not be impeded by state

authority. Such an impediment exists, since Appellant may not even operate to carry the mails in South Carolina if the South Carolina law is valid.

It is also well established that Congress may select an existing state corporation as an instrumentality for the accomplishment of national ends, and may properly grant to such a corporation franchises and powers to be exerted for objects of national concern. To the extent of the powers, rights, privileges and immunities granted to such corporations by the Federal government, Congress may exert the powers of amendment, alteration, and repeal. *23 Amer. Jur.*, Section 418, pp. 418-420.

In *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 24 L. Ed. 708, it was held that the Act of Congress of July 24, 1866, enacted to aid in the construction of telegraph lines, which provided that any telegraph company then organized under the laws of any state could construct, own, and operate lines of telegraph, the telegraph as an agency of commerce came under the controlling power of Congress and was protected against hostile state legislation, and therefore the Western Union could not be excluded by the State of Florida from prosecuting its business therein, so as to protect privileges extended by Florida to a rival telegraph company.

In *Stockton* v. *Baltimore & New York R. Co.*, 32 Fed. 9, in an opinion by Mr. Justice Bradley on circuit, the Circuit Court held that an Act of Congress of June 16, 1886, authorizing the Baltimore & New York Railroad Company and another railroad, both foreign corporations in the State of New Jersey, to construct and maintain a railroad bridge across Staten Island Sound to the New Jersey shore, was within the supreme power of Congress to regulate com-

merce, and the State of New Jersey could not oppose the construction on the ground that the two railroads had no authority from the state to exercise any corporate franchises therein and because they were expressly prohibited from exercising any such powers or franchises without permission of the legislature of New Jersey, which had not been conferred. The Court said:

> "Another question of a preliminary character relates to the capacity and right of the defendant, the Staten Island Rapid Transit Railroad Company, to perform any acts and transact any business as a corporation in New Jersey. It is argued that corporations, as such, have no legal existence outside of the state by whose laws they are created, and cannot transact business in another state except by the comity of its laws, which are not accorded in the present case. This doctrine is subject to much qualification. * * *
>
> "It is undoubtedly just and proper that foreign corporations should be subject to the legitimate police regulations of the state, and should have, if required, an agent in the state to accept service of process when sued for acts done or contracts made therein. In reference to some branches of business, like those of banking and insurance, which affect the people at large, they may also be subject to more stringent regulations for the security of the public, and may be even prohibited from pursuing them except upon such terms and conditions, not unlawful in themselves, as the state chooses to impose. But in the pursuit of business authorized by the government of the United States, and under its protection, the corporations of other states cannot be prohibited or obstructed by any state. If congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the

Union. And, in carrying on foreign and interstate commerce corporations, equally with individuals, are within the protection of the commercial power of congress, and cannot be molested in another state by state burdens or impediments. This was held and decided in the case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 204, 5 Sup. Ct. Rep. 826, and affirmed in the recent case of *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118; * * *

"At all events, if congress, in the execution of its powers, chooses to employ the intervention of a proper corporation, whether of the state, or out of the state, we see no reason why it should not do so. There is nothing in the constitution to prevent it from making contracts with or conferring powers upon state corporations, for carrying out its own legitimate purposes. What right of the state would be invaded? The corporation thus employed, or empowered in executing the will of congress, could do nothing which the state could rightfully oppose or object to. It may be added that no state corporation more suitable than the defendant could be empowered to build the bridge in question in this case, since one-half of the bridge is in the state of New York, and the railroad of the defendant is to connect with it on the New York side.

"In our judgment, if congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise. The objection that congress cannot confer powers on a state corporation is untenable. It has used their agency for carrying on its own purposes from an early period. It adopted as post-roads the turnpikes belonging to the

> various turnpike corporations of the country, as far back as such corporations were known, and subjected them to burdens, and accorded to them privileges, arising out of that relation. It continued the same system with regard to canals and railroads, when these modes of transportation came into existence. * * * The powers thus conferred were independent of the powers conferred by the charter of any railroad company. Surely these acts of congress cannot be condemned as unconstitutional exertions of power."

See also *Western Union Tel. Co.* v. *Texas,* 105 U. S. 460, 26 L. Ed. 1067; *Hooper* v. *California,* 155 U. S. 648, 39 L. Ed. 297.

Citing with approval *Stockton* v. *Baltimore & N. Y. R. Co.,* 32 Fed. 9 *supra,* this Court, speaking by Mr. Justice Field, said in *Pembina Consolidated Silver Mining Co.* v. *Pennsylvania,* 125 U. S. 181, 31 L. Ed. 650:

> "And undoubtedly a corporation of one State, employed in the business of the General Government, may do such business in other States without obtaining a license from them."

(4)

The South Carolina Constitutional and Statutory Provisions Are Void In and of Themselves as Imposing an Obstruction to and Burden Upon Interstate Commerce. They Prohibit the Ownership and Operation by a Foreign Corporation of Any Railroad Even in Interstate Commerce, and Do Not Attempt to Confine the Prohibition to Intrastate Ownership and Operation, Even if Such a Limited Prohibition Could, Under the Circumstances, Be Valid.

1. It is too well settled to require any extensive citation of authorities that a state can not exclude a foreign corporation from the transaction of interstate commerce within its borders. *Looney* v. *Crane Co.*, 245 U. S. 178, 62 L. Ed. 230; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 36 L. Ed. 164; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716.

Both the constitutional and statutory provisions in question here absolutely prohibit any ownership or operation of a railroad by a foreign corporation, and the provisions are so worded as to constitute an entirety, so that they can not be construed as permitting, even by implication, ownership and operation in interstate commerce and as confining the prohibition to ownership and operation in intrastate commerce.

For the purpose of the argument under this heading, we do not expand upon the obvious absurdity that would result, even if the South Carolina law was susceptible of any such interpretation. For both the constitutional and statutory provisions prohibit not only operation but *ownership* as well by a foreign corporation, so that the Seaboard

would have the empty privilege of operating in interstate commerce in South Carolina but without the right to acquire properties with which to operate.

It is equally well settled that a statute accomplishing all its results by the same general words must be valid as to all that it embraces or altogether void, for an exception of a class constitutionally exempted can not be read into those general words merely for the purpose of saving what remains. *United States* v. *Ju Toy*, 198 U. S. 253, 49 L. Ed. 1040. And, in the absence of a legislative declaration that invalidity of a portion of a statute shall not affect the remainder, the presumption is that the legislature intended the act to be effective as an entirety, so that, if any provision is unconstitutional, the remaining provisions fall with it. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160; *Harrison* v. *St. L. & S. F. R. Co.*, 232 U. S. 318, 58 L. Ed. 621.

In *Bowman* v. *Continental Oil Company*, 256 U. S. 642, 65 L. Ed. 1139, it was held that the invalidity as respects interstate commerce of an annual license tax imposed by New Mexico upon gasoline distributing stations, with a prohibition against further conduct of business without making the required payment, renders the tax unenforceable not only as to interstate but also as to domestic commerce operated by a dealer who conducted his interstate and domestic business indiscriminately at the same stations and by the same agencies. This Court said:

> "By accepted canons of construction, the provisions of the act in respect of this tax are not capable of separation so as to confine them to domestic trade, leaving interstate commerce exempt * * * *.
>
> "No doubt the state might impose a license tax upon the distribution and sale of gasoline in domes-

tic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. *But the difficulty is that since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax can not be enforced at all without interfering with interstate commerce, unless it be enforced otherwise than as prescribed by the statute,—that is to say, without authority of law. Hence it can not be enforced at all.*" (Emphasis Supplied.)

The italicised part of the foregoing quotation is particularly apt in its application to a modern railway system conducting both interstate and intrastate business through the same tracks, trains, stations, agencies, and other facilities in a blending incapable of separation.

In *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. Ed. 649, Kentucky required a license for the operation of express companies in the state, and prohibited the transaction of any business in the state until the filing of the charter of the express company, payment of the license fee, and also a certificate showing required dollar capitalization. The statute prohibited the transaction of any business in the state without compliance with these requirements. Holding that the statute applied indiscriminately to both intrastate and interstate commerce, and hence was void, this Court said:

"This [the statute], of course, embraces interstate business as well as business confined wholly

within the State. It is a prohibition against the carrying on of such business without a compliance with the state law. * * * *

"We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different States) does also some local business by carrying goods from one point to another within the State of Kentucky. This is probably quite as much for the accommodation of the people of that State as for the advantage of the company. But, whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. * * * * The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress."

The Supreme Court of South Carolina has itself stated, in the case of *Carolina C. & O. Ry.* v. *McCown*, 84 S. C. 318, 66 S. E. 418, that the main object of the framers of the Constitution in adopting Section 8 of Article 9 was to require foreign railroad companies, operating or seeking to operate railroads in this state, to be placed on the same footing with domestic corporations as to their rights and liabilities, under the jurisdiction of the state courts, meaning, of course, to prevent foreign railroad corporations from removing cases to the Federal courts. In the *McCown* case, *supra*, the Supreme Court of South Carolina said "this is the language of the court in *Railroad* v. *Tompkins*, 48 S. C. 49," *and it assigns the only reasonable ground for*

inserting this section in the Constitution." (*) (Emphasis supplied)

With this unequivocal interpretation of the purpose of the constitutional and statutory provisions by the highest court of the State, it is perfectly clear that it could not have been the intention of those provisions to exempt railroad operations in interstate commerce from the prohibition of ownership and operation. Moreover that purpose in and of itself would invalidate both the constitutional and statutory provisions, see *Harrison* v. *St. L. & S. F. R. Co.*, 232 U. S. 318, 58 L. Ed. 621; and *Donald* v. *Phila. & Reading R. Co.*, 241 U. S. 329, 60 L. Ed. 1027.

Since the purpose of the statute was to prevent removal of causes to the Federal courts, the South Carolina legislators obviously intended to make no distinction between intrastate and interstate commerce, because such a distinction would have no effect upon the question of removal.

In *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716, a statute of Oklahoma wholly prohibited foreign corporations transporting natural gas by means of pipe lines from conducting business in the state. The purpose of the statute was to confine the use and transmission of natural gas wholly within the limits of Oklahoma. It was held that, since the necessary effect was an exclusion of the right of the natural gas company to conduct interstate commerce, the statute was void.

In *Buck* v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623, a statute of the State of Washington prohibited use of interstate highways in the state by motor vehicles acting

(*) The constitutional provision here in question was adopted in 1895, presumably as a result of the legal warfare reported in *Ex Parte Tyler*, 149 U. S. 164, 37 L. Ed. 689 (1893).

as common carriers in interstate commerce without a certificate of public convenience and necessity from the state authorities. Buck was denied a certificate on the ground that existing motor vehicle service was adequate. Holding the statute invalid, Mr. Justice Brandeis said that the primary purpose of the law

> "is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner. * * * Thus the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce laws. It also defeats the purpose of Congress expressed in the legislation giving Federal aid for the construction of interstate highways."

A state statute that operates directly to burden any of the essential elements or instrumentalities of interstate commerce is invalid. In *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, 10, 73 L. Ed. 147, 153, it was held, for example, that a Louisiana statute prohibiting the shipping of shrimp out of the state, with the purpose of confining the processing and canning of shrimp packing to Louisiana, while permitting free shipment of the finished product, violated the Commerce Clause. In *Frost* v. *R. R. Commission,* 271 U. S. 583, 70 L. Ed. 1101, the Court repeated the established rule that a state may not use its powers to exclude a foreign corporation from business within its borders if in doing

so it denies a Federal right. See also *International Paper Co.* v. *Mass.*, 246 U. S. 135, 62 L. Ed. 624; *Sprague* v. *Thompson*, 118 U. S. 90, 30 L. Ed. 115; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 54 L. Ed. 678; *Lynch* v. *U. S.*, 292 U. S. 571, 78 L. Ed. 1434; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 73 L. Ed. 287.

Even assuming, however, that the South Carolina law could be construed as not interdicting ownership and operation of the railroad lines in that state if confined to interstate commerce, nevertheless that commerce would be unlawfully burdened and the ability of the Seaboard to perform its public duties economically and efficiently agreeably to the transportation policy declared by the commerce act would be impaired. Compare *Baldwin* v. *Seelig*, 294 U. S. 511; 79 L. Ed. 1032, where a law of the State of New York prohibiting the sale therein of milk purchased in other states, unless the price paid was no less than the New York price, unconstitutionally set a barrier to interstate traffic as effective as if custom duties had been laid in violation of Article 1, Section 10, Clause 2 of the Federal Constitution where this Court said:

> "It is the established doctrine of this court that a state may not, *in any form or under any guise* directly burden the prosecution of interstate business" (Emphasis supplied).

Confinement of the Seaboard to interstate operation would be no less unlawful than the effort of a state to hold charges for freight and passengers to a level found by the interstate commerce commission to impose a burden on commerce because depleting the revenues below the necessary level for efficient operation in the public interest,

and as effecting a burdensome discrimination against interstate revenues.

Even in the case of a tax, a state may not discriminate as to goods from another state after they have come to rest in the taxing state "if the real incidence of the tax is against the merchandise because of its origin in another *state.*" *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 67 L. Ed. 1095, and other cases cited in the opinion in *Baldwin* v. *Seelig, supra.*

(5)

In Excluding Foreign Railroad Corporations from the State, While Permitting Free Access to Other Types of Foreign Corporations, South Carolina Discriminates Against Such Corporations and in Favor of Other Corporations in Violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

No corporation except a railroad corporation is required to incorporate in South Carolina in order to do business within the state and there is no reasonable basis for the invidious classification of railroads as the sole objects of exclusion. That is especially so in view of the purpose, stated by the Supreme Court of South Carolina, in the decision of that court cited *ante* page 44, as the only one, of denying railroad corporations access to the Federal courts. Under Section 7764-7767 of the South Carolina Code 1942, foreign corporations generally are permitted to qualify for business in South Carolina by filing copies of their charter with the Secretary of State and paying the moderate initial fee of fifty dollars and an annual fee of ten dollars. In *Liggett*

Co. v. *Lee*, 288 U. S. 517, 536, 77 L. Ed. 929, 938, the rule is stated that:

> "Unequal treatment and arbitrary discrimination as between corporations and natural persons, *or between different corporations*, inconsistent with the declared object of the legislation, can not be justified by the assumption that a different classification for a wholly different purpose might be valid." (Emphasis supplied.)

In *Quaker City Cab Co.* v. *Penn.*, 277 U. S. 389, 72 L. Ed. 927, it was held that the equal protection clause of the 14th Amendment extends to foreign corporations within the jurisdiction of the state, and safeguards to them the protection of laws applied equally to all in the same situation, so that the plaintiff in error, a foreign corporation, was entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances. Accordingly, Pennsylvania could not tax a New Jersey taxicab company on a basis that discriminated in favor of domestic taxicab companies and individuals operating taxicabs. See also *Power Manufacturing Co.* v. *Saunders*, 274 U. S. 490, 71 L. Ed. 1165. And for arbitrary classification violative of the Fourteenth Amendment, see *Gulf C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. Ed. 666.

CONCLUSION

It is respectfully submitted that the Court should find that the Interstate Commerce Commission did not exceed its powers in this situation and that the judgment of the Supreme Court of South Carolina should be reversed with

directions for the issuance of a permanent injunction restraining the attempted enforcement by the appellee Attorney General of the South Carolina penalty statute and requiring the Supreme Court of South Carolina, and the officials of that state, to take further proceedings in accordance with the opinion of this Court.

W. R. C. Cocke,
J. B. S. Lyles,
Counsel for Appellant.

Harold J. Gallagher,
Leonard D. Adkins,
James B. McDonough, Jr.,
Of Counsel.

APPENDIX

A.

The pertinent constitutional and statutory Provisions of the State of South Carolina.

I

Constitutional Provisions

Section 8 of Article 9:

"Section 8. *No foreign corporation can build or operate a railroad in this State—no general or special law for foregin corporation, except on conditions.*—The General Assembly shall not grant to any foreign corporation or association a license to build, operate or lease any railroad in this State; but in all cases where a railroad is to be built or operated, or is now being operated, in this state, and the same shall be partly in this State and partly in another State, or in other States, the owners or projectors thereof shall first become incorporated under the laws of this State; nor shall any foreign corporation or association lease or operate any railroad in this State, or purchase the same or any interest therein.

"Consolidation of any railroad lines and corporations in this State with others shall be allowed only where the consolidated company shall become a domestic corporation of this State. No general or special law shall ever be passed for the benefit of any foreign corporation operating a railroad under any existing license of this State or under any existing lease, and no grant of any right or privilege and no exemption from any burden shall be made to any such foreign corporation, except upon the condition that the owners or stockholders thereof shall first organize a corporation in this State under the laws thereof, and shall thereafter operate and

manage the same and the business thereof under said domestic charter."

Section 11 of Article 9:

"Section 11.—*Election of Officers of Corporations.* The General Assembly shall provide by law for the election of directors, trustees or managers of all corporations so that each stockholder shall be allowed to cast, in person or by proxy, as many votes as the number of shares he owns multiplied by the number of directors, trustees or managers to be elected, the same to be cast for any one candidate or to be distributed among two or more candidates."

II.

Statutory Provisions

"Sec. 7777. *Requisites for obtaining charter.*—The owners or stockholders of each and every railroad company created or organized or by virtue of the laws of any government or State, other than this State, desiring to own property or carry on business or exercise any corporate franchise in this State whatsoever, shall, either in their names or by such persons as they shall designate, first apply for a charter and become incorporated, as a corporation of this State, in the manner provided by chapter 159. At least one of the petitioners for such charter of incorporation, and at least one of the incorporators of such railroad companies shall be a resident of this State."

"Sec. 7778. *How foreign railroad companies may do business in this State.*—Each and every railroad company created or organized under and by the laws of any government or State, other than this State, and now operating any railroad in this State, either as the owners thereof or otherwise, or carrying on any business or exercising any corporate

franchise in this State, shall, on or before the first day of June, 1902, apply for a charter of incorporation under the laws of this State, in the manner directed in section 7777, and no such railroad company shall carry on business or exercise any corporate franchise in this State after the said date, without having complied with the provisions of sections 7777 thru 7779 and 7783 thru 7787."

"Sec. 7779. *One of the corporators must be resident* —No charter shall be granted to any such railroad company under the provisions of sections 7777 thru 7779 and 7783 thru 7787, or of chapter 159 unless at least one of the corporators is a resident of this State, and all privileges heretofore acquired by any such railroad companies doing business in this State, are hereby revoked and repealed, on and after June 1, 1902, unless such companies have complied with the requirements of sections 7777 thru 7779 and 7783 thru 7787."

Sections 7777 through 7779, which are referred to in Section 7778, are set out above. Sections 7783 through 7787, which are also referred to in Section 7778, are here set forth:

"Sec. 7783. *Companies complying with provisions excused from paying other fees.*—All persons applying for the incorporation of any railroad company, under the provisions of sections 7777 thru 7779 and 7783 thru 7787, shall pay the fees required by chapter 159, except such railroad companies as have complied with the provisions of an act to provide for the incorporation of railroad companies, approved March 9, 1896, and paid the fees fixed by said act as amended by an act approved the 5th day of March, A. D. 1897."

"Sec. 7784. *Penalty for Failure to comply with law.* —It shall be unlawful for any such foreign railroad company to do business, or attempt to do business, in this State without first having complied with the requirements of sections 7777 thru 7779 and 7783 thru 7787. Any violation of sections 7777 thru 7779 and 7783 thru 7787 shall be punished by the forfeiture to the state by the party offending of a penalty of five hundred dollars, to be recovered by suit in the court of common pleas, for each and every county in which such offender does, or attempts to do, business, or in any other court of competent jurisdiction. And it shall be the duty of the attorney general to bring suit for recovery of such penalty for each and every offense."

"Sec. 7785. *Consolidations of railroad companies.*— The provisions of sections 7777 thru 7779 and 7783 thru 7784 shall in no way abrogate or repeal the right of railroad companies to consolidate according to law or effect consolidation already made according to law, when at least one of the corporations so consolidating is a corporation of this State, with corporators resident in this State."

"Sec. 7786. *Corporations domesticated under laws in accordance with Constitution of 1895, excepted.*— The provisions of sections 7777 thru 7779 and 7783 thru 7785 shall not be construed to extend to any corporation that may have heretofore become domesticated under the laws of this State passed in accordance with the terms of the Constitution of 1895."

"Sec. 7787. *Liability of railroad company to actions for damages.*—Any railroad company referred to in sections 7785 and 7786, may for all causes of action for injury to the person or property of any citizen of this State, along the line of road, arising hereafter in the operation of any line of railroad which was

originally chartered and operated under the laws of this State, and which is now owned or leased and operated by it, be sued jointly with the company originally incorporated in this State, and which owned and operated said line of railroad; and said railroad company originally chartered in this State, or said consolidation of railroads, shall be and remain liable upon all such causes of action, and may be made a party defendant in all actions for such injuries."

"Sec. 8285. *Companies may merge and consolidate.*—It shall be lawful for any railroad company organized under the laws of this State, and operating a railroad, whether wholly within or partly within and partly without this State, under authority of this and any adjoining State, to merge and consolidate its capital stock, franchises and property with those of any other railroad company or companies organized and operated under the laws of this or any other State, whenever two or more railroads of the companies proposed to be consolidated are continuous or are connected with each other or by means of any intervening railroad. Railroads terminating on the banks of any river which are or may be connected by ferry or othrewise shall be deemed continuous under this article. Nothing in this article contained shall be taken to authorize the consolidation of any company of this State with that of any other State whose laws shall not also authorize the like consolidation: *provided,* that nothing contained in this section shall authorize any merger or consolidation inconsistent with the Constitution and laws of this State, with regard to parallel or competing railroad lines, but such merger and consolidation shall be subject to the limitations mentioned and specified therein: *provided, further,* that when railroad companies are consolidated under the

provisions of this article a charter of incorporation for the new company so formed by such consolidation shall be issued to the owners and stockholders of the company so consolidating or to such of them as the stockholders of each of said companies shall designate: and *provided, further,* that only the fees now provided by law for consolidation be charged, and no additional fee be charged for such charter."

"Sec. 7764. *Rights and privileges granted to foreign corporations.*—Foreign corporations duly incorporated under the laws of any State of the United States, or of any foreign country in treaty and amity with the said United States, are hereby permitted to locate and carry on business within the State of South Carolina in like manner and with like powers as corporations of like kind and class created under the laws of this State, subject, nevertheless, to the terms and conditions in this chapter hereafter set forth."

"Sec. 7765. *Stipulation to be filed by foreign corporations doing business in this State.*—Each and every foreign corporation now doing business in the State of South Carolina, or that may hereafter apply for admission, shall, within sixty days, file with the secretary of state a written stipulation or declaration in due form, designating some place within this State as the principal place of business or place of location of said corporation, in this State, at which all legal papers may be served on said corporation, by delivery of the same to any officer, agent or employee of said corporation, found therein: *provided,* that whenever any foreign corporation transacts business in this State without first having complied with the provisions of the within section, and pursuant thereto designating a principal place of business or place of location of said corporation in this State at which all legal processes may be served, said foreign cor-

poration so transacting business in this State without complying with said section shall be deemed to have designated the secretary of state as his true and lawful agent upon whom may be served all legal process in any action or proceedings against said foreign corporation growing out of the transaction of any business in this State. Said service of process shall be made by leaving a copy of the process, with a fee of one ($1.00) dollar in the hands of the secretary of state, or in his office, and such service shall be deemed sufficient service upon said foreign corporation and such service shall have like force and effect in all respects as service upon citizens of this State found within the limits of the same: *provided*, that notice of such service and a copy of the process are forth-with sent by registered mail by the plaintiff to the defendant foreign corporation and the defendant's return receipt and the plaintiff's affidavit of compliance therewith are filed in said cause and submitted to the court from whom said process issued and the said service of said process may be made by delivery to said corporation of a copy thereof outside the State and proof of such delivery may be made by the affidavit of the person delivering the same, which affidavit shall be filed in said cause and be submitted to the court from which said process issued. The court in which the action is pending may order such continuances as may be necessary to afford the defendant foreign corporation reasonable opportunity to defend the action: *provided, however,* that nothing herein shall apply to insurance companies or associations heretofore by law required to pay fees to the department of insurance of this State."

"Sec. 7766. *Papers and statements to be filed*—In addition to the said declaration, each corporation is hereby required to file in the office of the secretary

of state, together with written stipulation or declaration aforesaid, copies of their charter and by-laws, with all increases of capital stock and amendments to the same that may from time to time be made, within sixty days from the date of making the same. In addition thereto, the said corporations are required to file annually in the office of the secretary of state on or before the thirty-first day of January of each year, a statement sworn to by some officer of the corporation, showing the residence and postoffice address of such corporation within the State, the amount of capital stock of the same actually paid and the names of the president and secretary (if there be any such), and the board of directors with their respective places of residence and postoffice addresses."

B.

The Pertinent Provisions of Section 5 of the Interstate Commerce Act.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers

to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction

proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transactions; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion and upon a finding that such inclusion is consistent with the public interest.

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such

purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchise acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.